MIAMI REVIEW — MIAMI, FLORIDA

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-902

RICHARD H. OLSEN,

Petitioner

vs.

SAUL GOODMAN,

Respondent

REPLY TO BRIEF IN OPPOSITION

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MIAMI REVIEW — 371-4853 — 377-3721

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (cont.)

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In accordance with the provisions of Rule 24.4 and 24.5, this Reply will be limited to arguments first raised in Respondent's Brief in Opposition and to "other intervening matter" not available at the time of the filing of Petitioner's Petition for Writ of Certiorari.

I

The intervening matter is the deposition of Florida Supreme Court Justice James C. Adkins taken September 15, 1976 in the matter of *The Florida Bar*, Complainant, vs. *David Lucius McCain*, Respondent, a proceeding to determine whether former Justice McCain should be prohibited from practicing law in Florida. Pertinent pages of this deposition are printed as Appendix A. The existence of this deposition did not become known until it was placed in evidence on February 16, 1977 in the Florida Bar proceedings against former Justice David L. McCain, as reported in the Florida press on February 17, 1977. Efforts were then made to obtain a copy of the deposition.

In the deposition, Justice Adkins, who was Chief Justice of the Florida Supreme Court at the time of the impeachment proceedings before the Select Committee on Impeachment of the Judiciary Committee of the Florida House of Representatives, testified that just prior to Justice McCain's resignation he had a weekend-long series of conferences with Justice McCain. As a result of these conferences, he testified that he approached the members of the Select Committee and gained from them agreement that the Committee would halt its impeachment inquiry into Justice McCain's activities provided he submitted his resignation from the Florida Supreme Court. He stated that he did this "because, if that is what he was going to do, I would rather not have any articles of impeachment ever entered against a member of the Court . . . " (Appendix A, Page 3) In other words, the then Chief Justice intervened to prevent the inquiry of the Select Committee from running its full and, by then, obvious course.

II

The Brief in Opposition, which was filed by Respondent, not as a matter of initial conviction within the time set forth in Rule 24.1, but only after a specific request from the Court on February 8, 1977, hews no closer to the facts of record than the briefing memoranda of former Justice McCain. It does, however, raise for the first time several points to which reply should be made. The first of these appears in the Counter-Statement of the Case. Respondent avers that the "Petition in favor of Review" filed by the Speaker of the Florida House of Representatives and by the Chairman of its Judiciary Committee were authorized only by counsel for the Select Committee, which Committee Respondent alleges expired upon former Justice McCain's resignation. The fact of the matter is that at a meeting of the Select Committee held April 28, 1975 a motion was passed continuing the operation of the Select Committee for the purpose of making information developed on former Justice McCain available to the Florida Bar, members of the Bar, and to Florida authorities (Transcript of the Select Committee, Vol. 6, Book V, pp 146-151). Contrary to Respondent's assertion, filing of the "Petition in Favor of Review" was specifically authorized by the Speaker of the House of Representatives, who is constitutional officer of the State of Florida, and by the Chairman of the House Judiciary Committee, which is a continuing body of the House of Representatives.

III

Respondent's brief next challenges the jurisdiction of this Court to entertain the pending Petition for Writ of Certiorari on the ground that the denial by the Supreme Court of Florida of Petitioner's Petition to that Court for

a Constitutional Writ in Aid of Jurisdiction did not constitute a final judgment within the meaning of 28 U.S.C. 1257.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 497 (1975), this Court discussed at length the question of what constitutes a final judgment under 28 U.S.C. 1257. It concluded that there are now at least four categories of cases wherein it has treated resolution of a Federal issue by a State Supreme Court as a "final judgment" for the purposes of 28 U.S.C. 1257 and has taken jurisdiction without awaiting completion of additional proceedings in lower State courts. Though each category has merit and applicability to the case *sub judice*, the first category is directly on point.

In describing the category of cases, this Court said:

"In the first category are those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or *the outcome of further proceedings preordained*. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final. In *Mills v. Alabama*, 384 U.S. 214, 16 L.Ed.2d 484, 86 S.Ct. 1434 (1966), for example, a demurrer to a criminal complaint was sustained on federal constitutional grounds by a state trial court. The State Supreme Court reversed, remanding for jury trial. This Court took jurisdiction on the reasoning that the appellant had no defense other than his federal claim and

> could not prevail at the trial on the facts or any nonfederal ground. To dismiss the appeal 'would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in the judicial systems already troubled by delays due to congested dockets.' Id., at 217-218." (emphasis supplied.)

Additional cases supporting this position are: *Organization for A Better Austin v. Keefe*, 402 U.S. 415 (1971); *Local No. 438 v. Curry*, 371 U.S. 542 (1963); *Pope v. Atlantic C.L.R. & Co.*, 345 U.S. 379 (1953).

In the instant case, Petitioner has been denied due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, by reason of the actions of former Justice McCain and by the refusal of the Supreme Court of Florida to review these actions. The refusal of the Supreme Court of Florida so to do will force Petitioner into a retrial where the outcome, by reason of former Justice McCain's actions, is preordained, unless this Court takes jurisdiction and remands the proceedings with appropriate instructions, as requested in the Petition for a Writ of Certiorari.

IV

Respondent next asserts that the action of the Supreme Court of Florida denying Petitioner's Petition for a Constitutional Writ was sound as a matter of fact and of law, citing *State ex rel Watson vs. Lee*, 8 So.2nd 19 (1942), as authority for the proposition that the Supreme Court of

Florida lost jurisdiction over the instant proceedings with the issuance of its decision and order of November 7, 1974. However, the prevailing view of the Supreme Court of Florida as to its power to reverse itself is set forth in the case of *Lovett v. State*, 11 So. 176 (1892). In this case the Supreme Court of Florida reversed a decision of a lower court based upon a "false" representation of the record, and issued a remittitur which was filed in the latter court. After discovery of the misrepresentation, the Court reversed itself, correcting the error and said, at 180:

> "The consideration or reversal or affirmance of a judgment or decree, *upon a misrepresentation of the record of the cause, or upon anything else than the true record of that cause,* is entirely outside the functions or purpose of an appellate court." (emphasis supplied)

In pursuing this matter further, the Court continued, saying:

> "This case is, in our judgment, clearly within the rule which preserves our jurisdiction of it. *We have been misled into reversing a judgment on a false record;* into acting in a cause when that cause, as it really is and only can be acted on by us, has not been before us. *In law, the writ of error issued in the cause is, in so far as our exercise of our powers is concerned, still before us, and will be until that cause, as it really is, shall be decided,* or the writ dismissed on legal grounds. Ostensibly it has passed from use, but only through the means of a misrepresentation, and by

> decision of a case which is not shown by the real record and does not exist. In the eyes of the law, however, decisions or judgments obtained in this manner are not binding on us." (emphasis supplied)

In reaching the above decision, the Court relied on the case of *Rowland v. Kreyenhagen*, 24 Cal. 52, wherein, after stating the general rule that a court loses jurisdiction after issuance of a remittitur, said:

> "... it is said that this general rule rests upon the supposition that all the proceedings have been regular, and *that no fraud or imposition has been practiced upon the court or the opposite party,* and that, if it appears that such has been the case, the court will assert its jurisdiction, and recall the case; that against judgments improvidently granted upon a false suggestion, or under a mistake, as to the facts of the case, the court will afford relief after the adjournment of the terms, and, if necessary, recall the remittitur, and stay proceedings in the court below; *that this is not done upon the principle of resumption of jurisdiction, but upon the ground that the jurisdiction of the court cannot be divested by an irregular or improvident order; that, in contemplation of law, an order obtained upon a false suggestion is not the order of the court, and may be treated as a nullity;* if, under color of such an order, the proceedings have in part (fact) found their way back to the court below, yet in the law they are considered as still pending in the appellate court, and

> that court may take such steps as may be necessary to make the facts and law agree." (emphasis supplied)

In the instant matter the Supreme Court of Florida had the unquestioned power and authority to examine what Petitioner considers misrepresentations of fact and law, as well as any abuses of its own internal procedures and processes.

On page 27 of the Brief in Opposition, Respondent makes much of the fact that Justices Adkins, Roberts, Ervin and Boyd concurred with Justice McCain in the November 7, 1974 opinion, with only Justice Overton dissenting on the grounds that the Court improperly asserted jurisdiction. This completely misses the point, but at the same time serves to underscore it. Justice McCain was the lead justice and under the practice of the Court prepared briefing memoranda on the proceeding for the benefit of the other members of the panel. All but Justice Overton, a new member of the Court, were misled by the briefing memoranda. Thus, in reality there were not five independent votes in favor of the opinion, but a single vote echoed four times.

CONCLUSION

On the basis of the pending Petition for a Writ of Certiorari and the foregoing Reply to Respondent's Brief in Opposition, Petitioner respectfully urges the Court to grant his Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

THE FLORIDA BAR

Complainant

vs.

DAVID LUCIUS McCAIN

Respondent

Deposition of JAMES C. ADKINS, taken in the above-styled cause, pursuant to notice, at the Supreme Court Building, Tallahassee, Florida, before W. Paul Rayborn, CSR, RPR on the 15th day of September ,1976, commencing at 2:04 p.m.

Reported by:

W. PAUL RAYBORN, CSR, RPR

APPEARANCES

WILSON J. FOSTER, JR., Assistant Bar Counsel, P.O. Box 1347, Tallahassee, Florida 32302, appeared on behalf of the Complainant.

BERNARD H. DEMPSEY JR., Assistant Bar Counsel, Suite 704, Pan American Building, 250 North Orange Avenue, Orlando, Florida 32801, appeared on behalf of the Complainant.

ROBERT J. BECKHAM, Attorney at Law, of the law firm of Beckham, McAliley & Proenza, Suite 3131, Independent Square, One Independent Drive, Jacksonville, Florida 32202, appeared on behalf of the Respondent.

INDEX

JAMES C. ADKINS

called as a witness, having been duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

EXAMINATION BY MR. DEMPSEY:

Q Judge, would you state your full name, please?
A. James C. Adkins.

Q This is a matter pertaining to David L. McCain, as you know.
A (Nodded affirmatively)

Q And I want to ask you certain questions with regard to your knowledge of David McCain and certain of the allegations that involve him where your name has been mentioned.
(CONTINUING ON PAGE 46)

Q Now, you were, of course, Chief Justice during the period of time that David McCain decided to resign from the Florida Supreme Court. During that period of time, did you have any conversation with McCain with regard to his resigning?
A Yes. I spent most of Friday, Saturday and Sunday before his resignation with him or at his house.

Q And at that time did you offer him any type of advice?
A Well, I went by on Friday afternoon to get some cases and about the Court's business generally. He was there at his house and we started talking about his present problems. And I think he started by asking me what I would do under the circumstances if I were him.

And we started then a general conversation that lasted for a number of hours. And he finally reached the conclusion that it would be for the best interest of the Court and he felt maybe he would be better off if he decided to resign.
(CONTINUING ON PAGE 46)

And I told him, if that was his judgement, that I would try to get word to the Joint Select Committee, because, if that's what he was going to do, I would rather not have any articles of impeachment ever entered against a member of the Court and see if I could straighten that out.

So I spent most of the rest of the time trying to run down the members of the Committee and work out something with them where we could stop their proceeding on the condition that David would resign. And I also called Jim Ervin, who was the president of the Florida Bar and David asked me to check on what repercussions, if any, would follow from the Bar before he decided what he wanted to do.

And I think Jim had a conference call, he said, with some members of the Executive Committee and that he would call me Friday. And he told me that they had decided they wouldn't commit themselves one way or the other and he added that the Executive Committee felt that, he thought, that the Chief Justice ought to keep out of it and I had acted improperly. And I hung up before I told him I thought he was acting improperly, that I was working for the betterment of the Court, which was an odd thing to do at that time.

But the next morning the resignation was delivered by McCain's brother and Billy Joe Rish called me that (CONTINUING ON PAGE 48)
morning and said he was taking it to the Governor. And the Governor called me and we worked out the acceptance of his resignation.

Q Did anyone in a responsible position on behalf of the Florida Bar ever indicate to you that David McCain—that grievance proceedings would not be instituted against McCain in exchange or in return for his resignation?

A No, I can't say that. They doubted jurisdiction, but they would not commit themselves one way or the other on it. My function in that was purely as Chief Justice to

try to work out something in the benefit of the Court and in the benefit of David. So I can't say that there was any commitment. No, they said that they wouldn't commit themselves on it.

Q Who else was it that indicated that he doubted jurisdiction?

A That was Jim Ervin. I don't say that he doubted it. I said there was a question about it.

Q Now, with regard to the conversation that you had with McCain, did you and he discuss the merits or the allegations that were revolving about him and concerning him?

A No. He denied them. It wasn't a question of going into whether he was right or wrong. It was purely, (CONTINUING ON PAGE 49) after all he had gone through, the emotional problems. His family was upset. He was concerned about the backlash on the Court. We had been through so much. And so it was just a general, overall conversation about, under the circumstances, what was the best for everybody.

Q What is the precise understanding you had with the legislative committee concerning the effect of the tender of the resignation?

A The understanding of the legislative committee was that they would stop their investigation, their proceeding at that moment upon acceptance of the resignation, that the committee would present the resignation to the Governor with a request that he accept the resignation. And they took it to the Governor that morning about eight-thirty and the Governor called me and he had some reservations about the delay in the acceptance.

And I might add that I had discussed that with McCain and the purpose of—we never discussed pension or anything else. The whole thought was that there were hundreds of cases pending up here where he was on the panel. And, as I explained to the Governor, some of these cases had been argued and, as an administrative procedure, if he just (CONTINUING ON PAGE 66) stepped out suddenly, I would have to have all of the cases reargued on five-man panels, which he sat on, which would mean the parties would be delayed and the lawyers would have to come back, too.

He understood the administrative problem. And August was the recess month, anyway, and all we did there was clean up stuff pending. And he agreed to accept the resignation. I have forgotten what date it was, September 1st or whatever it was. And then he asked that McCain not cast a deciding vote or something of that nature. And I didn't think it was any of his business. I agreed to that.

And I think there was only one case that I administratively messed up and had a five-man panel that McCain was on and his vote could be construed as one of the deciding votes. And we granted a rehearing in that one. But it was primarily because of administrative problems that we reached the date of the resignation.

CERTIFICATE

STATE OF FLORIDA)
)
COUNTY OF LEON)

I, W. PAUL RAYBORN, CSR, RPR, at Tallahassee, Florida, do hereby certify as follows:

THAT I correctly reported in shorthand the foregoing deposition of JAMES C. ADKINS, at the time and place stated in the caption hereof;

THAT the witness was duly sworn and examined by counsel;

THAT I later reduced my shorthand notes to typewriting, or under my supervision, and that the foregoing pages 1 through 70, both inclusive, contain a full, true, and correct transcript of the proceedings on said occasion;

THAT I am neither of kin nor of counsel to any party involved in this matter, nor in any manner interested in the result thereof.

THIS ___ day of _____, 1976.

W. PAUL RAYBORN, CSR, RPR
Notary Public
State of Florida at Large
My Commission expires 1/11/78.